**Sunrise Healthcare Corporation d/b/a Mediplex of Wethersfield *and* New England Health Care Employees Union, District 1199, AFL–CIO.** Cases 34–CA–6761 and 34–CA–6931

December 22, 1995

## DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND TRUESDALE

On September 29, 1995, Administrative Law Judge Wallace H. Nations issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Sunrise Healthcare Corporation d/b/a Mediplex of Wethersfield, Wethersfield, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

''(a) Respondent shall remove from its files any record of the unlawful warning given Marcus Edwards on August 1, 1994, and notify him in writing that this has been done and that the warning will not be used against him in any way.''

2. Substitute the attached notice for that of the administrative law judge.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We note that the administrative law judge's decision in *Mediplex of Milford*, which the judge here cited with approval, was affirmed by the Board. See 319 NLRB 281 (1995). In that case, Member Browning dissented from the Board's finding that the respondent's campaign video did not violate the Act. In the absence of exceptions, the lawfulness of the video in this case is not before the Board.

[2] In both his recommended Order and notice, the judge inadvertently referred to a warning issued to Marcus Edwards on July 27, 1994. As that warning was not found to be unlawful, we shall delete the references to it from the recommended Order and notice.

## APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten to discharge employees because they engage in protected concerted activities.

WE WILL NOT restrict employees' access to our facility at times when they are not on duty because they engage in activities on behalf of District 1199.

WE WILL NOT coercively interrogate employees and threaten them that layoffs will result from the employees' selection of the Union as their bargaining representative.

WE WILL NOT threaten employees that they will lose benefits if the Union is selected as bargaining representative or, alternatively, promise greater benefits if the Union is not selected.

WE WILL NOT use security guards to harass employees because they engage in protected concerted or union activities.

WE WILL NOT threaten to stop granting personal favors to employees if the Union is selected as their bargaining representative.

WE WILL NOT give employees written warnings because they engage in activities on behalf of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL remove from our files any record of the unlawful warning given Marcus Edwards on August 1, 1994, and notify him in writing that this has been done and that the warning will not be used against him in any way.

SUNRISE HEALTHCARE CORPORATION
D/B/A MEDIPLEX OF WETHERSFIELD

*Thomas E. Quiqley, Esq.*, for the General Counsel.
*Harold R. Weinrich, Esq.*, and *Joseph M. Martin, Esq.*, of White Plains, New York, for the Respondent.

## DECISION

### STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. New England Health Care Employees Union, District 1199, AFL–CIO (the Union) filed a charge with the Board in Case 34–CA–6761 on October 7, 1994,[1] and filed an amended charge on December 5. The Union thereafter filed a charge in Case 34–CA–6931 on February 14, 1995, and an amended charge on March 21, 1995. Based on these charges, the Regional Director for Region 34 issued complaints in both cases in which it is alleged that Sunrise Health Care Corporation d/b/a Mediplex of Wethersfield (Employer or Respondent) has engaged in conduct in violation of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The instant cases were consolidated by Order dated April 5, 1995. The Respondent has filed timely answers to both complaints wherein it admits the jurisdictional allegations and the allegations relating to supervisory status of various of its employees. Respondent denies committing any unfair labor practices.

Hearing was held in these matters in Hartford, Connecticut, on June 26, 27, and 28, 1995. Briefs were filed by the parties on or about August 14, 1995. Based on the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

Respondent, a corporation with an office and place of business in Wethersfield, Connecticut, has at all material times been engaged in the operation of a sub-acute health care institution. It admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act.

#### II. THE INVOLVED LABOR ORGANIZATION

It is admitted and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

#### III. THE ALLEGED UNFAIR LABOR PRACTICES

##### A. *The Issues Presented for Determination*

In July, the Union began an organizing campaign at the Respondent's facility. By August 19, the Union had obtained signed and dated authorization cards from a majority of the unit employees. On that date, the Union demanded recognition from Respondent, which refused. The Union then filed a representation case petition on August 19. On August 31, the parties stipulated that the appropriate collective-bargaining unit is as follows:

> All full-time and regular part-time service and maintenance employees, including certified nursing assistants, physical therapy aides, occupational therapy aides, housekeeping employees, dietary employees, laundry employees, central supply clerk, unit secretaries, admissions secretaries, and maintenance employees employed by the Employer at Mediplex of Wethersfield, located at 341 Jordan Lane, Wethersfield, Connecticut, but excluding cooks, social service designees, therapeutic recreation directors, staffing coordinators, admission coordinators, business office clerical employees, licensed practical nurses, and guards, professional employees, and supervisors as defined in the Act.

An election was scheduled to be held among Respondent's affected employees on October 13. Prior to this date, Respondent waged a vigorous and, in some respects, unlawful campaign to defeat the Union's efforts. The Respondent's antiunion campaign was effective and, about a week or two prior to the election, support for the Union apparently dropped dramatically. The General Counsel asserts that the campaign's effectiveness was the result of a number of unfair labor practices committed by Respondent that left the employees believing that seeking union representation would be a futile act. In response to the loss of support among the employees, on October 7, the Union withdrew its request to proceed and the Regional Director issued a letter on the same date notifying the parties that the processing of the representation case petition was being held in abeyance pending investigation of the unfair labor practice charge filed in Case 34–CA–6761. The complaints that subsequently issued allege that Respondent violated the Act by the actions set out below:

1. By then-Administrator Thomas Quinn:

(a) About July 6, threatening employees with discharge for engaging in protected concerted activities.

(b) About July 27, (i) threatening employees with unspecified reprisals for engaging in union activities; and (ii) verbally warning employees not to leave their work area unless on a break and by telling employees they could only speak to other employees about the Union when on a break.

(c) About August 19, threatening employees with decreased benefits because they engaged in union activities.

(d) About September 25, (i) interrogating employees about their union membership, activities, and sympathies; (ii) threatening to lay off employees if the employees selected the Union as their bargaining representative; and (iii) informing employees that it would be futile to select the Union as their bargaining representative.

(e) In about late September, (i) threatening employees with discharge for engaging in union activities; and (ii) informing employees that it would be futile to select the Union as their bargaining representative.

(f) About October 5, (i) threatening employees with loss of benefits for engaging in union activities; and (ii) informing employees that it would be futile to select the Union as their bargaining representative.

2. About August 3, by director of nursing and admitted supervisor, Arlene Powers:

(a) Threatening employees with discipline because employees engaged in union and other protected concerted activities.

(b) Threatening employees with stricter enforcement of work rules because employees engaged in union and other protected concerted activities.

3. About October 4, by Powers:

[1] All dates are in 1994 unless otherwise noted.

(a) Promising employees increased benefits if they rejected the Union as their bargaining representative.

(b) Informing employees that it would be futile to select the Union as their bargaining representative.

4. In about mid-September, by admitted Supervisor Norman Turgeon:

(a) Interrogating employees about their union membership, activities, and sympathies.

(b) Threatening employees with loss of benefits if the employees selected the Union as their bargaining representative.

5. In about late September, by regional manager and admitted supervisor, Ed LaMonde:

(a) Threatening employees with discharge if the employees selected the union as their bargaining representative.

(b) Informing employees that it would be futile to select the Union as their bargaining representative.

6. About October 3, by Respondent's security guards in the parking lot of its facility, engaging in surveillance of its employees' union and other protected concerted activities.

7. About October 4 and 5, in a videotape shown to employees at its facility:

(a) Disparaging the Union.

(b) Informing employees that it would be futile to select the Union as their bargaining representative.

(c) Threatening employees with loss of jobs if they engaged in union and other protected concerted activities.

8. About August 1,[2] and about January 31, 1995, issuing written warnings to its employee Marcus Edwards.

9. About August 19, withdrawing telephone benefits from its employee Richard Green.[3]

The consolidated complaint seeks a cease-and-desist order, withdrawal of the warnings issued against Marcus Edwards, restoration of the telephone privileges of Richard Green, and a bargaining order requiring Respondent to recognize and bargain in good faith with the Union. The Regional Director filed a petition for temporary injunction with the U.S. District Court in Hartford, Connecticut, pursuant to Section 10(j) of the Act on April 26, 1995. The Honorable U.S. District Judge Dominic J. Squatrito, on May 23, 1995, issued an opinion and order in which he granted the petition in all respects except for the requested bargaining order. At the hearing held here, Respondent, while continuing to deny the allegations set forth in the complaint with respect to the alleged commission of unfair labor practices, chose not to put on any evidence with respect to the allegations, except for those involving Kevin Prisco and Norman Turgeon. It instead relied on testimony given during cross-examination of the General Counsel's witnesses and legal argument. What evidence it chose to adduce here primarily was directed to demonstrate that a bargaining order would not be an appropriate remedy. Given this background, the alleged unfair labor practices will be addressed chronologically hereinafter.

[2] The complaint alleges this warning was given on August 3, and testimony relating to it would indicate it was given on August 4. The warning itself, however, G.C. Exh. 8, is dated August 1. Though it makes no real difference, I accept the August 1 date.

[3] Green did not appear in this proceeding as a witness and no other witness testified about this alleged violation. Consequently, as no evidence was adduced in support of the allegation, the General Counsel has requested that this allegation be withdrawn. About February 9, 1995, by current administrator and admitted supervisor, Kevin Prisco, informing employees that it would be futile to select the Union as their bargaining representative.

### B. *Did the Respondent Violate Section 8(a)(1) by Administrator Thomas Quinn's Threat of Discharge to Employee Marcus Edwards on July 6?*

Thomas Quinn was the administrator of Respondent's facility for several years until he left Respondent's employ in November. Prior to the early summer of 1994, Mediplex of Wethersfield was not part of Sunrise Health Care Corporation (Sun or Sunrise). Sunrise purchased the Wethersfield facility together with several other such facilities in Connecticut in or about June 1994. Quinn is alleged to have violated the Act on two occasions in July, both incidents involving an employee named Marcus Edwards. Edwards has been employed at the Wethersfield facility as a CNA (certified nursing assistant) for 3 years. His rate of pay has been $10.16 an hour at all times material to this proceeding. In addition to his full-time employment with Respondent, he also works part time at another, unionized, Sunrise health care institution where he earns $11.26 an hour.

Shortly after Mediplex of Wethersfield was purchased by Sunrise, in the first week of July, Respondent's CEO Andrew Turner met with the employees at Wethersfield and, according to Edwards, promised that he would raise the pay of CNA's. This meeting took place before the union organizing campaign got underway and before Respondent had knowledge of any such organizing. Another official with Sunrise, Priscilla van Heiningen, gave the employees some documents, and Edwards read one to indicate that employees working more than 24 hours a week would receive paid time off, or PTO. On cross-examination he was shown his affidavit that indicated that the official had indicated that if an employee worked 24 hours or more, they would be eligible for PTO. This appears to be the fact of the matter. Edwards testified that he asked van Heiningen if CNA's working the required number of hours would now receive PTO and he was given an affirmative answer.

The following day, Edwards spoke with Respondent's then-administrator, Quinn, about the matter.[4] Edwards asked why the employees had not received PTO in the past and, thus, did not the Company owe some money to the employees who did not receive PTO. Quinn explained that Edwards had elected to receive a $1-an-hour pay increase in lieu of PTO.[5] Edwards, however, had gotten the impression from the previous day's meeting that he was entitled to PTO notwithstanding his election. He told Quinn that he believed that another CNA was receiving both the extra dollar an hour and

[4] Quinn resigned his employment with Respondent on November 23. Quinn, van Heiningen, and Turner did not testified in this proceeding. Therefore, I have credited Edwards' testimony about this and other matters involving these officials of Respondent. Edwards gave some internally conflicting testimony, however, and to the extent that it is necessary to credit some portion of his testimony over another, I have credited that which seemed most consistent with other uncontroverted facts or with his affidavit given to the Board during the investigation stage of this proceeding, a time closer to the events in question.

[5] Respondent offered employees the option of having certain benefits including medical insurance and PTO or foregoing the benefits and receiving a extra dollar an hour. Edwards had elected to receive the higher pay instead of the benefits.

PTO. Quinn said he would look into this situation and the conversation ended. Edwards' testimony about the matter of the PTO is often confusing. At some point he testified that in this conversation, Quinn agreed that he would be receiving PTO in the future. His affidavit makes no mention of this, however, though it covers the conversation in detail. I therefore do not credit this last assertion by Edwards.

Edwards then decided to tell his coworkers his opinion that Respondent had a new PTO policy that Sunrise was going to put into effect. He also told these employees that Sunrise had cheated them and owed them money because they should be getting PTO as well as the extra dollar. This ''news'' excited the workers and they began calling Quinn about the matter. On July 6, Quinn went to Edwards at his work area and after finding a private place to speak, told Edwards, ''You are pissing me off. Who gives you the authority to make rules around here?'' Edwards replied, ''Mr. Quinn, I'm just a worker here . . . you're the boss, you're the one that makes the rules.'' Quinn then said, ''Marcus, it has not been one or two, but it's been several people coming to me, telling me what you said about the PTO.'' Edwards said, ''Mr. Quinn, it is my right to tell the people about the PTO.'' Then he told Quinn that he felt the employees had been cheated in the past. Quinn exclaimed, ''Marcus I like you as a person and I like you as an aide, but you're pissing me off and if anyone ever comes to me again, and tells me about what you said about the PTO, I have no other choice but to let you go.'' Quinn ended the conversation and left.

Although I believe Edwards to be in error regarding his understanding of what van Heiningen told the employees in the July meeting, I also believe that he believed he was correct. I find that Edwards' speaking to his coworkers in July about the matter of the PTO is protected. Even though Edwards' comments to his coworkers were defamatory toward Respondent, a defamatory statement will not lose the protection of the Act unless it is ''so offensive, defamatory or opprobrious'' to remove it from the protection of the Act and is made ''with knowledge of its falsity, or with reckless disregard of whether it was true or false.'' Edwards' statements do not fall into this category and, thus, Respondent's threat to discharge him if he continued to make them violates Section 8(a)(1) of the Act. *KBO, Inc*., 315 NLRB 570 (1995), and cases there cited.

### C. *Did Respondent Violate the Act by Threatening Edwards on July 27?*

Edwards was a leader in the Union's organizing effort that began at about the time of the unlawful warning given to him as discussed above. The campaign began when one of Respondent's employees called the Union asking for representation. A few days later, Edwards and a few other employees met with Union Organizer Cathy Panasuk. On July 20, the Union conducted three large meetings with employees of Respondent at the union hall, telling them about the Union and soliciting the signing of authorization cards. Edwards attended one of these meetings with 20 or 25 other employees. He observed other employees signing cards, including Madeline Harold, Lester Jones, and Kevin Thomas. An informal employee organizing committee of 10 to 15 employees was established. Edwards was on the committee as were his coworkers Madeline Harold, Barbara Brown, Domingo Rodriguez, Verda James,[6] Sandy Simpson, Donna Russell, and Richard Green. The committee met regularly in weekly meetings at the union hall in Hartford. Respondent learned of the campaign early on and began a campaign against the organizing effort on July 18 by distributing to employees a memo concerning ''Union Coercion,'' in which Quinn promised to take ''legal action'' to protect any employee who had been ''coerced and threatened by union organizers who have tried to get them to sign union cards.''

On July 28, Edwards clocked in for work and spoke to another employee in the clock room about the Union. Supervisor Jackie Bernowski was present and broke up the conversation by asking Edwards if he had clocked in. He said he had and she told him to get out, pointing in the direction of his work area. Edwards left and went to work. About 15 minutes later, he was approached by Quinn who told him that he was threatening and harassing other employees. Edwards asked him to name anyone he was harassing, and Quinn said it did not matter, one employee was enough. Edwards denied harassing or threatening anyone about the Union. Quinn replied that he was giving Edwards a warning.[7] Edwards was aware of the Company's no-solicitation rule that prohibits solicitation by employees while working. Edwards contends that the Employer allows employees to talk about other subjects, such a sports, while working. Edwards did not offer evidence, however, that employees were allowed to solicit for any reason on worktime. Quinn told him to limit solicitation to break periods.

Quinn then told Edwards that he did not want him to come to the facility unless he was working or visiting a patient. Edwards said that this was depriving him of his right to enter the facility. Quinn restated his position. Edwards asked him what if he came to the facility to pick someone up and he wanted to come in. Quinn said he was to stay outside. Quinn then told him he could not leave his wing unless he was on break, and that if Edwards wanted to talk about the union to a coworker, to make sure such conversations take place on breaks.

Edwards testified that he had visited the facility about 10 times in the past on a day off to talk with coworkers. He had been observed doing this by Quinn and prior to the union campaign had never been told he could not come in to the facility on a day off.

I do not find that Quinn placed an unlawful limitation on Edwards' right to communicate with other employees or solicit their support for the Union by limiting such solicitation to nonworking time. Edwards admitted that the Respondent had in place such a rule and he had knowledge of it. Edwards' other testimony reflects that he regularly solicited on breaktime without any problem.

The record is also replete with evidence that Respondent had in place and enforced its rule that employees do not leave their work areas except for breaks and then with permission of a nurse or other supervisor. Therefore, I do not find that Quinn violated the Act by reminding Edwards of this rule.

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[6] Verda James is also known as Verda Jones.

[7] If indeed Quinn gave Edwards a warning within the disciplinary scheme of Respondent, no written record of it was introduced into evidence.

I do find that Respondent violated the Act by restricting Edwards access to the facility when he was not on duty. Although Respondent on brief cites a provision of the Respondent's rules that purport to restrict access by off-duty employees, such rule was not introduced in evidence in this case. Moreover, no one challenged Edwards' testimony that he had not been denied access before the union campaign began and such a limitation was first made known after the campaign started. Based on Edwards' testimony, I find that Respondent effectively instituted a limitation on access to the facility in response to the union campaign in order to inhibit it and thus violated the Act.

### D. *Did Arlene Powers on August 1 Unlawfully Threaten Edwards with Discipline and Stricter Enforcement of Rules Because He Engaged in Protected Activity?*

Edwards was disciplined in August by Director of Nursing Arlene Powers for failing to follow Respondent's procedures for taking breaks. Edwards described the Respondent's break policy to be that employees had one 15-minute break and a 30-minute meal break each 8-hour shift. On August 3,[8] Edwards took his 15-minute break and went to a snack machine away from his unit to get something to eat. He informed another CNA that he was leaving the unit and that CNA covered for him while he was gone. It was Edwards' testimony that he had to notify someone whenever he left the work unit, and that person could be another CNA, or a charge nurse. He testified that he had followed this practice in the past. On the occasion in question, Edwards encountered Director of Nursing Arlene Powers[9] on the way to the snack machine. It was an unusual time for Edwards to be taking a break and Powers asked him where he was going. He said he was getting a snack as he was hungry. Powers asked if he was on break and he said he was. Powers then asked him if he had notified anyone that he was leaving his wing. He told her he had. Powers then went to Edwards' wing and he encountered her again on his way back. Powers told him he had failed to notify the charge nurse of his departure. He said he had notified a fellow CNA. Powers said that company policy requires that a charge nurse be notified and that she was going to write him up for violating the policy.

The next day, Powers called Edwards in to sign a warning and he argued with her that she did not treat other employees the same, pointing out that Powers had seen another employee off the employee's wing and did not investigate to see if that employee had notified a charge nurse. Powers disagreed, saying she had asked if the employee had notified a nurse, and named an employee. Edwards countered by saying he had spoken with the employee and had been told that all Powers said to her was ''good afternoon.'' Edwards then asked Powers if he was being disciplined because of the Union and Powers said no. Prior to this incident, Edwards had not been given a formal written or verbal warning.

In response to the General Counsel's question, ''Do you recall if anyone at the facility ever said anything to you about having to enforce the rules more strictly?'' Edwards responded, ''Yes. That was Mrs. Powers.'' Powers made this statement during the meeting where Edwards was given his warning.

Respondent has a written policy dating back several years that requires CNA's taking breaks to ''report off to nurse'' before going on break. Other than Edwards, other employees offering testimony in this case noted that Respondent had always required that before an employee took a break, he or she must tell his or her supervisor or a nurse. Subsequent to the union campaign, in January 1995 according to one witness, the Respondent added a requirement that employees sign an in-and-out sheet when taking breaks. This requirement, however, was not in place in August. Another witness testified that Respondent had not enforced this rule prior to the union campaign.

On the other hand, Respondent introduced a written warning given to a CNA in February 1994 because the ''CNA failed to report off to charge nurse regarding break time.'' Another warning was given to an employee for leaving her wing without permission for about 40 to 50 minutes. Thus, I find that Respondent did have in place before the campaign a rule requiring that employees report to a nurse before going on break, and had enforced that rule prior to the campaign. I still find that Respondent's warning, however, given to Edwards for violating this rule is an unfair labor practice. Respondent's animus toward the Union is well documented in this record. Reference to General Counsel's Exhibit 5 alone will demonstrate the extreme level of opposition leveled at the union campaign by the Respondent. As noted, Edwards was one of the leaders of the campaign and had been targeted by Quinn for an unlawful warning earlier. Edwards' uncontradicted testimony reflects that on the same day that Powers investigated the circumstances of his break, she either accepted another employee's assertion that she had permission to be on break, or simply did not see fit to investigate whether the employee had properly reported off to a nurse or not. Powers also told Edwards that Respondent would be enforcing its rules more strictly. Based on the evidence of record, I can only find that Powers investigated whether Edwards had followed Respondent's rule regarding breaks because of his union activities. Had Powers testified about the incident and offered an explanation for treating Edwards differently from other employees, or had given a credible explanation of why she chose to investigate the circumstances of Edwards' break, I may have made another finding. In the circumstances, however, I find that the General Counsel had made a prima facie case of discriminatory treatment because Edwards engaged in activities on behalf of the Union that was unrebutted by Respondent. Accordingly, I find that it violated the Act by issuing a written warning to Edwards on August 4.

### E. *Did Respondent Violate the Act by Quinn's Threat of Layoff Made to Edwards in September?*

On September 25, Edwards met with Quinn in Quinn's office. Edwards wanted to complain about a nurse who allegedly was harassing him, in his mind because of his union activities. After voicing his complaint, according to Edwards, Quinn asked him why he wanted the Union. He told Quinn that there would be higher pay, paid vacations, and a pension plan. Edwards then asked Quinn what happened to the PTO

[8] As noted earlier, the warning given Edwards is dated August 1. Thus, as he later testified the warning was given to him the next day, the day in question was either the last day of July or the first day of August.

[9] Powers did not testify and I accept Edwards' version of the involved incident.

that was supposed to accrue when Sunrise assumed ownership of the Wethersfield facility. Quinn told him he did not have PTO. Edwards again told Quinn what van Heiningen had told him in the July meeting and complained that the Company's policy vis-a-vis PTO is only verbal and not in writing. He then asked Quinn why he was against the Union and Quinn told him that if the Union came in, the employees would relax and there would be a potential for violence.

Quinn then told Edwards of the personal things he had done for employees in the past, such as giving money to employees, helping them buy a house, noting that it would not be right for these employees to bring in a union. Edwards asked him if he would give him money and Quinn said no, he could not do that. Quinn then told Edwards that the Union would create a hostile environment and that he was hiring security guards to protect his people. Edwards assured him there was not going to be any violence.

Edwards also remembers Quinn saying that he felt that the Union had the majority of the votes, but that he would do anything and everything to keep the Union out. After a fair amount of prompting by the General Counsel, Edwards remembered Quinn saying that if the Union came in, he would have to pay employees more money, and that if that occurred, that he would have to lay off some people.[10] As stated by Edwards, Quinn was flatly asserting that layoffs would be the consequence of unionization, and no objective facts to support this conclusion were given by Quinn.

Crediting Edwards' testimony I find that Respondent violated Section 8(a)(1) of the Act by the assertion that selecting the Union would lead to layoffs, and by the interrogation itself as it was coercive, containing a threat of layoff and Quinn's statement that he would do anything and everything to keep the Union out. *Jenmar Corp. of Utah,* 301 NLRB 623 (1991); *Texas Super Foods*, 303 NLRB 209 (1991). There is no showing that a threat that layoffs would follow unionization was made by Quinn or any other official of Respondent to any employee other than Edwards. I cannot find anything in this conversation that would support the complaint allegation that Quinn informed employees that it would be futile to select the Union as their bargaining representative.[11]

[10] Although I credit Edwards' testimony set out above in the absence of any denial by Quinn, there are questions about his credibility raised by what I perceive to be inconsistencies in his own testimony. For example, Edwards attended an employee meeting at some point in July when Quinn spoke. Edwards testified that during the meeting, Quinn would occasionally point at him and direct comments at him. Edwards could not remember the contents of these comments. At the close of the meeting, Quinn walked up to him and said in the presence of the other employees, ''Thank you for making my life a living hell.'' If in fact this testimony is true, Quinn clearly did not consider Edwards his ally and friend, and thus I seriously wonder why Quinn would have the almost heart to heart talk on September 25 as described by Edwards.

[11] I can find no evidence to support the complaint allegation that about August 19, Respondent threatened employees with decreased benefits because they engaged in union activities.

### F. *Did Respondent Violate the Act by Supervisor Norman Turgeon's Threats of Reduced Benefits Made to an Employee in September?*

Domingo Rodriguez is employed by Respondent as a dietary aide and at all material times was supervised by Food Service Director Norman Turgeon. Rodriguez was a member of the employee organizing committee and a known leader of the effort. He had a conversation about the Union with Turgeon at some point in September. He was working when Turgeon approached him in the company of two cooks who were not eligible to vote in the upcoming election. The three men started criticizing the Union, telling him to do his homework and visit unionized facilities to see if the employees there were happy. According to Rodriguez, Turgeon told him that with the Union, he would get a 3-percent raise, but would get a 5-percent raise without the Union.[12] Turgeon also advised him to wait a year and see what happened at another Sunrise facility where it was negotiating with the Union.

Turgeon testified that he was aware that Rodriguez was supporting the Union because he had seen him wearing a union button. He admitted telling Rodriguez that Sunrise was the new owner of the facility and was giving up to 5 percent in raises, so with an excellent performance evaluation an employee could receive a 5-percent increase. He denied telling Rodriguez that a 5-percent raise is guaranteed by Sunrise, or that if the Union gets in he would not get a 5-percent increase. According to Turgeon, he told Rodriguez that it was his understanding that the last two contracts the Union had negotiated were for 3 percent a year for 2 years for those employees. He denied saying that if the Union gets in Rodriguez would only get 3 percent. He told Rodriguez that before he made his final decision, he might consider going to some union homes, look around, and see if the people were really happy. He denies threatening Rodriguez or making him any promises.

Based on my observation of the two witnesses, I credit Rodriguez' version of the involved conversation. Rodriguez appeared totally credible whereas Turgeon's testimony on direct was too pat and his answers to the General Counsel on cross-examination evasive. Thus, crediting Rodriguez' testimony, I find that Turgeon did impliedly promise that if the Union was not selected as the employees' bargaining representative, then they would receive a 5-percent increase in wages, but could only get 3 percent in the event the Union did represent the employees. I believe that such a statement leaves the clear impression that employees can only expect reduced benefits if the Union is elected. I find this to be in violation of Section 8(a)(1) of the Act.

[12] On cross-examination, Rodriguez testified that Turgeon never promised him anything. Regardless of what Rodriguez regards as a promise, I find that Turgeon's statement to Rodriguez as a matter of law amounts to a promise that a benefit would flow from not selecting the Union or, alternatively, a threat that decreased benefits would result from selection of the Union.

### G. *Did Respondent Violate the Act by Using Security Guards To Surveil Employees' Union and Protected Concerted Activities?*

In late September, Respondent hired security guards who worked at the driving entrances and exits of the facility. Sandra Simpson, who is employed by Respondent as a CNA, testified that security guards were hired by Respondent because a union representative allegedly tried to run over a CNA named Herb Grant, who was antiunion. She testified that when the Union tried to leaflet employees entering or exiting the facility in their cars, the guards would try to intimidate the employees by staring at them and looking at their license plates. The guards stayed until the Union canceled the election. On the other hand, she testified on cross-examination that the guards did not say anything to her or tell her to move on, and that she took leaflets from the union representatives in the presence of the guards. She also was a known union supporter as she wore a union button during the campaign.

In a similar vein, Marcus Edwards complained that when he left the facility one night after work, the guards shined a bright flashlight in his face before he could exit the facility in his car. At this time, there were union organizers at the exit trying to pass out literature to departing employees and the security guards told him to get on.

During the period of September through November 1994, Jhomphee Ventura worked as an organizer for the Union and assisted in the campaign to organize Respondent's employees. On October 3, during the night, Ventura went to the facility to leaflet employees at the shift change. He arrived at about 10:30 p.m., parked his car nearby, and walked to the driveway to the facility where employees coming to work would be entering with their cars. He intended to talk with employees entering and give them some union literature. On this evening, for the first time, he encountered a security guard while walking toward the drive on a public sidewalk. When Ventura reached the driveway, the guard approached to within 10 to 15 feet of him. Employees entering the facility, who had in the past stopped and spoken with Ventura, on this night slowed, looked at the guard, and kept going. Ventura spoke to the guard, telling him he was intimidating the employees and should leave. The guard responded that he was stationed there to prevent Ventura from stopping traffic.

Thereafter, a car driven by employee Deborah Gonzales did stop, and she asked Ventura how he was doing. There were no other cars in the vicinity. The guard said to her, ''Come on, move it. Don't block traffic.'' Ventura told her not to worry about the guard, testifying that Gonzales was very scared. Ventura testified that when a car would pull up, the guard would point his flashlight at the cars and the drivers' faces. Ventura told the guard he should not point the light at the employees' faces and that he should leave.

Shortly after this incident, another employee, Johnnie Dowdell, stopped to speak with Ventura. She was being driven to work by her husband. Ventura wanted to ask if she had seen a video shown by Respondent to employees. At this point the guard approached the car and said, ''Move, you're blocking traffic.'' Ventura testified that in fact, there was no other car in the vicinity. Ventura told the Dowdells not to worry about the guard. The guard was waving his flashlight in the Dowdell's faces and telling them to move. Ventura testified that they were frightened. The guard then moved to the rear of the car to write down its license plate number. After this incident, Ventura was very upset and demanded to know the guard's name, telling the guard that what he was doing was illegal. The guard responded, ''I don't know about that. I'm doing what I was told to do.'' Ventura testified that the guard shined his flashlight only at cars that stopped. No other employees stopped to talk with Ventura that night, though normally 6 to 12 employees did stop.

Based on the record evidence, Respondent had a legitimate reason for hiring the guards. No one disputed Simpson's testimony that it was in response to an incident in which an employee was nearly injured by a car. I do not find that their mere presence at the entrances and exits, and their efforts to keep traffic moving would be violative of the Act. The testimony of Ventura establishes, however, that at least on one occasion, one of the guards attempted to interfere with the Union's right to communicate with employees and to intimidate the employees, causing them not to communicate with the Union. Ventura's undenied testimony establishes that the cars driven by Gonzales and the Dowdells were not impeding traffic and that the admitted purpose of the guard was to prevent them from speaking with Ventura. The guard's actions on this occasion goes beyond any legitimate purpose he may have served and violates the Act as it tends to interfere with, restrain, and coerce employees in the exercise of their Section 7 rights. *Aero Industries*, 314 NLRB 741, 751 (1994).

### H. *Did Respondent, Through Quinn and Respondent Regional Manager Ed LaMonde, in a Meeting with Employees in Late September Threaten Employees with Discharge and Inform Them It Would Be Futile to Select the Union as Bargaining Representative?*[13]

Among a series of meetings held by Respondent with employees to spread its message, Quinn and Regional Manager Ed LaMonde held one with dietary department employees in late September. Testimony about this meeting was given by Verda James, who is employed by Respondent as a dietary aide and was an active supporter of the union campaign. According to James, Quinn presided over the meeting and began by talking about medical insurance, saying that the Union's plan was no good, and that the Union owed a lot of money for bills. After Quinn spoke, LaMonde spoke and said that if the Union won the election it did not mean the Respondent would agree to whatever the Union wanted. He added that there would not be a contract for years, saying that the parties would bicker and that the employees could or would go on strike if Respondent did not agree to the Union's demands.[14] He noted that if the strike went on for a long time, the employees could lose their jobs to replacements and could only get their jobs back when there were openings. He warned that when on strike the employees would not make any money.

[13] The complaint alleges an independent allegation of a threat to discharge employees as well as an allegation that employees were informed that it would be futile to select the Union as bargaining representative. No official of Respondent is named with respect to this allegation and I can find no evidence to support the allegation.

[14] James first testified that LaMonde said that employees could go on strike, then changed it to say that he said that employees would go on strike.

On cross-examination, James' testimony changed somewhat. She testified that Quinn said that he knew people who worked at facilities in which the employees have District 1199 as their Union and those employees do not get any benefits that are better than Wethersfield employees currently receive. She recalled that Quinn said that the Union could not guarantee the employees anything. With respect to LaMonde's statements, she testified that he said that even if the Union won the election, the Union could not guarantee that it would get a contract. LaMonde said that if the employees go on strike, they could be replaced and the employees would get zero for their paychecks. He also said that if Respondent replaced striking employees, the replacements would not leave immediately and the employees could not get their jobs back until there was a formal opening. She admitted on cross-examination that he did not say that the employees could lose their jobs. He did say that negotiations could go on for some time, for a number of years.[15]

Dietary department employee Domingo Rodriguez attended the same meeting described by James, above, and gave testimony about what he remembered being said. According to Rodriguez, Quinn told the employees that Respondent did not ''have to comply with—with any negotiations they put on the table.'' He modified this to say, ''Mediplex didn't have to agree with any terms that the Union [proposed].'' Quinn added, ''that if that didn't happen, we would have to go on strike, and we wouldn't be able to collect any welfare, food stamps or unemployment.'' ''And that we wouldn't be able to get our jobs back, if we went on strike.'' According to Rodriguez, LaMonde said the same things.

On cross-examination, Rodriguez testified that Quinn said that even if the Union got in, and had all these demands on the table, Mediplex did not have to agree to anything, to any union proposals. He also admitted that neither Quinn nor LaMonde said the Respondent would refuse to negotiate. Rodriguez on cross-examination also stated that Quinn said that there could be a strike if the parties did not reach agreement. Quinn added that Respondent could permanently replace employees if there was a strike. Rodriguez testified neither LaMonde nor Quinn said that if employees went on strike they would be fired. Rodriguez took the statements made about replacements to mean that if he went on strike and was replaced, he would not get his job back. He admitted, however, that Quinn said that if employees were replaced and wanted their jobs back, they would be placed on a list. Quinn also said that the Union's insurance was not as good as that offered by Respondent, pointing out that under the union plan, there was only one HMO choice, whereas the Company had more choices.

I can find no violation of the Act in the statements attributed to Quinn and LaMonde, as modified in the witnesses' cross-examination. As modified the Respondent did not threaten not to negotiate in good faith or predict that there would not be an agreement reached. It did note that negotiations could take a long time, that the Union could not guarantee anything, that the employees could go on strike and be replaced, and not be hired back until a job opening occurred. I find nothing unlawful in such statements nor do I find unlawful Respondent's characterization of the Union's health plan as inferior to the one it offers. *Eagle Comtronics, Inc*., 263 NLRB 515 (1982). I will dismiss the complaint allegation regarding this meeting.

I. *Did Quinn and Powers Violate the Act by Statements Made to Employees in Meetings Held October 4 and 5?*

In the first week of October, Quinn and Powers held meetings with some of the unit employees wherein the two officials spoke with the employees and then showed an antiunion video called ''The Choice is Yours.'' Both the statements made by the management officials and the video itself are alleged to be in violation of the Act. One of these meetings was described by Donna Russell, who is employed by Respondent as a CNA and has been so employed for 2 years. Quinn spoke at the meeting about the insurance plans offered by Respondent and the Union, telling the employees the Union was in debt and that Respondent's insurance was good. She contends that Quinn said that Respondent is not going to guarantee that there will be negotiations and that if the Union comes in, Respondent will not bargain with the Union. On the subject of negotiations, she testified on cross-examination that Quinn said, ''If a union comes in, there's no guarantee that we're going to get a contract.'' The witness had a great deal of difficulty remembering exactly what Quinn or Powers said. She did recall Quinn saying that if the Union came in, there was going to be no real negotiations because there was no guarantee that the employees were going to get what they asked for, and there was no guarantee that they would ever get a contract, and that it would take up to 1 year. She recalled him saying that the Union lied because it couldn't guarantee employees anything, and all it could guarantee employees was that they would pay union dues.

She also remembered Quinn saying that if the employees go on strike, ''there's no guarantee that if we get fired, we going to get our job back. And if we get our job, we have to wait in line until there's an opening. He say we have a contract to prove that we can't get—we don't have to get our job back. We get fired for that.'' On cross-examination, Russell testified that Quinn said, ''If you go on the picket line, that there's no guarantee we could get our job back if we get fired. If we lose our job. And even if we can, we have to wait in line until there's an opening.'' He did not use the words fire or fired. Her affidavit states that Quinn said, ''that if we go on strike, he can replace us all. And there is no guarantee that he would hire us back because they have a law here that states that they don't have to hire you back if someone has taken your job.'' That once we go on the picket line, he can replace us permanently if he finds someone else. And if we want to come back, we have to wait for an opening.'' In testimony Russell gave in the Federal court injunction proceeding, she agree with the statement, ''During the course of that meeting, Mr. Quinn didn't tell you that you were going to be fired because of your union activity.''

Additionally, she testified that Quinn said that he had given a newly hired employee bereavement pay as a personal

[15] James attended another such meeting on October 6. At this meeting, Quinn stated that the Union did not pay its members' medical bills under its insurance plan. He showed the employees a stack of documents purporting to be unpaid bills of employees at another Sun facility in which the employees were represented by the Union. He noted that some employees' salaries had been garnished because the Union had not paid the bills. What Quinn said at this meeting is not alleged to violate the Act.

favor. She remembers either Quinn or Arlene Powers saying that if the Union were in place, such favors would not happen.

Arlene Powers spoke at this meeting and according to Russell, said the employees were a family and should stick together, that a third party was not necessary. Russell's affidavit states, ''Quinn also told us it is not nice to have a third party involved because it will complicate things, and we won't be able to come into his office and talk to him one-on-one any more, because we will have to bring in the third party, and then he gave an example.'' The example was the girl given bereavement pay. With respect to the example, Quinn commented that if the Union were here, he could not do that, and could not do any special favors, pointing out that if a contract was negotiated, the Company would have to follow the contract.

According to Russell, Powers said that at the other Sunrise facilities in which the Union was voted in, the employees already had their raises before the election. She urged the employees to give Sunrise a chance, that the employees would eventually get up to the pay standard of the other facilities. Russell remembers Powers saying that if a union comes in, there is no guarantee that employees will get a raise. In the Federal court proceeding, she testified that Powers said, ''That if you gave Sun a chance, that you would then have a better chance of getting your wages up that high without a union,'' noting that Powers did not promise that they would go up that high. According to Russell, Powers said that Sunrise's CEO was not going to negotiate a contract.

Sandra Simpson attended the meeting in question. She testified that the Employer showed a video to the employees at the meeting, which Simpson said was about strikes and antiunion. According to Simpson, Quinn said that negotiations with the Union could take from 1 to 3 years, and the Company did not have to agree to anything in negotiations. He told them if the employees went on strike, they could not collect welfare or unemployment, could be permanently replaced, and would be rehired based on seniority. He told them with a third party, there could be no favors, that with a union employees could not come directly to him, and that it would no longer be like a family at the facility. He said that employees would have to meet with him with a union delegate present. This third party testimony does not appear in the witnesses' affidavit. Powers told the employees to vote, because for each ''no'' vote, the Union will get two ''yes'' votes. She asked the employees to give Sunrise a chance for a year and, if there is no change, to vote the Union in then.

On cross-examination, Simpson agreed that Quinn said that if employees strike, then he could replace them and that if employees were replaced, they would not be called back until an opening occurred and then they would be recalled based on seniority. He also said the Company would not pay the salaries of striking employees.

Simpson seemed to have the clearest recollection of what Quinn and Powers said at the meeting. Russell admitted having difficulty remember exactly what was said and as can be seen from the recitation given above, her testimony shifts considerably, though not for any intentional reason. Carefully considering the testimony of both witnesses, I cannot find as asserted by the General Counsel that the statements of Powers and Quinn unlawfully disparaged the Union, sent a message that it would be futile to select the Union, or threatened that employees could lose their jobs and benefits because their union activity would inevitably lead to a strike and permanent replacement. I find that the Respondent did communicate that the Union cannot guarantee anything, that the Employer does not have to agree to any particular proposal, that if it does not meet the Union's demands, the Union may strike and the employees may be permanently replaced and would be hired back on the basis of seniority. Simpson's testimony clearly supports this condensation of what was said and, as noted, Russell's memory was admittedly faulty.

I do note two areas that need further attention. The first is Russell's unsupported assertion that Powers said that Respondent's CEO would not negotiate with the Union and her similar assertion that Powers said Respondent would not negotiate with the Union. I do not credit these assertions for three reasons. First, they are totally contrary to the statement that begins the involved video, which states, ''Sun would bargain in good faith with District 1199 if it won a validly certified election but as this videotape demonstrates unionization does not necessarily result in a positive outcome.'' Second, they are not supported by anything in Simpson's testimony and, third, Respondent has engaged in negotiations with the Union at other locations.

The next matter is that of the alleged loss of benefits suggested by Quinn's statement that he would no longer be able to grant favors if a union were in place as he had in the past. I cannot find anything unlawful about telling the employees that a third party would be involved in any future dealings between management and employees, but having the third party involved and having a contract in place, would not necessarily preclude Quinn from doing a favor for an employee. The Union might have to agree, but Quinn cannot assert that would be impossible. Thus, I do find that Quinn impliedly threatened employees with the loss of an existing benefit, albeit a rather nebulous one, and will find that this statement violates the Act.

### J. *Did the Video Violate the Act?*

The complaint alleges that the involved video violated Section 8(a)(1) of the Act in that it (a) disparaged the Union; (b) informed employees that it would be futile for them to select the Union as their collective-bargaining representative; and (c) threatened employees with loss of jobs if they engage in protected concerted activity.[16]

As noted above, the video was shown to employees about a week before the scheduled election. The videotape begins with a written statement on the screen, which reads:

> We do not mean to imply that unionizing is futile nor suggest that unsuccessful negotiations, loss of benefits, strikes, violence, property damage, physical harm, loss of employment, facility closings, or other negative outcomes are the inevitable or the natural result of unionization.
>
> Sun would bargain in good faith with District 1199 if it won a validly certified election but as this video-

[16] On brief the General Counsel appears to drop the assertion that the video threatened employees with loss of jobs, asserting instead that it threatens loss of benefits. I cannot find that the video threatens employees with loss of their jobs in any respect.

tape demonstrates unionization does not necessarily result in a positive outcome.

Then a pleasant sounding female narrator gives notice of the upcoming NLRB vote in an explanation that she summarizes as an opportunity for the employees to vote for the Union or to vote to give Sun a chance to prove that the employees do not need a union.

Next, John Kolenda, Sunrise's vice president, describes the Sun Group of companies, noting that Sun began in 1987 with seven facilities, of which four were in Connecticut. He points out that the Company has grown to have 120 facilities nationwide. He then briefly describes the other companies comprising the entire Sun group of companies. He concludes this segment by stating that the reason Sun has grown so fast is its employees' commitment to providing quality care.

The narrator again appears and states that Sun's focus is on people. She adds that Sun listens to employees and gives them a voice in decisions about patient care and their jobs.

Next Priscilla van Heiningen, director of human resources, appears and states Sun's employee philosophy is to listen to employees and respond to them. Kolenda then appears and notes that he and the president of Sun visited the Mediplex Connecticut facilities being acquired and explained their plans and listened to employee feedback. Kolenda points out that he had started as a CNA and understands the employees' questions and feelings when an acquisition occurs.

The narrator and Kolenda then describe Respondent's nonunion facility that it has operated for 5 years at Windham Hill, Connecticut. Short clips appear thereafter containing statements of purported employees extolling the pay and working conditions at Windham Hill and the lack of need for union representation there. They note that the employees there are like family and a team. They resolve problems within the facility and thus there is no need for outside help, i.e., a union.

The narrator then summarizes the message given by the employees. Van Heiningen then describes the pay given by Sun, pointing out that it pays competitive wages. She states that a study was made of wage comparability when the Mediplex operation was acquired by Sun. Kolenda then appears and states that in the early meetings with employees they found that adjustments had to be made and Sun immediately gave wage increases in most employee classifications. He notes the wages paid to CNA's at Windham Hill, and van Heiningen points out that the average wage increase given employees at Windham Hill has been 5 percent annually and that those employees do not pay union dues.

The narrator next visually emerges to explain that the union organizing effort precludes Respondent from making promises of benefits and that Sun is not implying that the Wethersfield employees would get the same benefits as the Windham Hill employees presently receive, but that Sun's record there shows you do not need a union to be treated fairly.

A purported employee at Windham Hill comes on and states she would quit if a union came in because it would spoil the conditions existing there.

The narrator then poses the question that if Sun has such a good record at its nonunion facility, why is it facing a union election. Kolenda answers the question by stating, ''We screwed up,'' noting that when Sun took over the Mediplex buildings it instituted a new health plan and got immediate employee feedback that they did not want that plan, they wanted their HMO. He then noted that the president of Sun responded and told employees in June meetings, that in the fall, a flexible benefit plan would be introduced, which would have an HMO option.

Van Heiningen describes how the flex plan was prepared, using employee surveys. She then describes the plan, which has a variety of options. This is compared with the comparable plan offered by District 1199, which has far fewer options and is purportedly more costly to the employees.

The narrator then states that Sun is asking for a chance to continue the changes they have already begun and urges the audience to vote no in the election.

She then explains that a collective-bargaining agreement is not automatic, even in situations when the employer owns other unionized facilities in which contracts have been in place. She states, ''In most cases the Union must bargain from scratch,'' which she points out often takes a period of 6 months to a year to achieve. She states that in the meantime, ''new wage and benefit policies'' cannot be put into effect and that in some cases a union never negotiates a first contract.

The narrator then comments that District 1199 often promises to obtain for newly organized employees the benefits they have obtained in collective-bargaining agreements for other bargaining units at other employers' facilities. The narrator then points out that District 1199 has taken 5 to 7 years to negotiate wages that matched those obtained in its other older contracts at other locations. The video names three locations in support of this statement. She asks the viewer to compare the Union's experience at St. Elizabeth's (another health care facility employer) where it took years to obtain the benefits it had obtained in its other older contracts at other locations. She states that the Union was certified as bargaining agent at St. Elizabeth's in 1992, but that by 1997, the collective-bargaining agreement there will still not achieve the average wage level currently provided by Respondent at the nonunion Windham Hill facility. She points out again that the Windham Hill employees do not pay union dues and that over the life of the St. Elizabeth contract the employees will pay over a thousand dollars in union dues.

She states that when a union fails to get its wage and benefit demands, it has two choices, drop the demands or call a strike. She continues by saying that strikes are not inevitable, but are possible. She points out that in an economic strike, permanent replacements can be hired and that striking employees would have to wait until a position opened up to get their job back. Thereafter is shown a series of short clips of purported employees who characterize their strike experiences, e.g., striking employees insensitivity to patient needs.

The narrator asserts that District 1199 has a history of strike violence and cites a 1973 strike conducted by the Union without prior notice at the ''New York League of Voluntary Hospitals and Nursing Homes,'' where she claims that 20 patients died. She then asks how employees who do not join a strike can expect to be treated by strikers. There is then shown another series of clips containing statements of purported employees who crossed picket lines during undated strikes noting incidences of name calling and yelling. One such purported employee emotionally sets forth the personal opinion that the Union's ''big thing is to try to instill

fear . . . 'We know where you live. We know where your children are. We'll get those kids.''' The speaker does not explain where she obtains this knowledge. Her statements are followed by a home video sequence purporting to show a demonstration by strikers in the street in front of her home. Another purported employee whose face is left in the dark so she cannot be identified describes how her car was surrounded by strikers.

The narrator appears and, in a serious but not histrionic tone, refers to a strike at ''Harbor Crossing'' when a 67-year-old woman was scheduled to give a statement to ''federal agents'' to the effect that strikers had threatened to vandalize her new car. The narrator then states that the statement could not be given because the woman died of a heart attack shortly after viewing strikers vandalize her car with baseball bats.

She then states that the strike at Harbor Crossing ended 3 months later, but shortly thereafter the facility shut down and the employees lost their jobs. She then names three other facilities that shut down permanently after strikes. She then states that Respondent does not say that if the Union is designated as bargaining agent that such episodes will happen at Wethersfield, but points out that ''strikes are always possible'' and that representation by the Union is ''no guarantee'' of job security, better wages, or a contract. She asserts that with all the risks involved, making the right choice is important and again asks that Sun be given 1 year to prove that ''you can be happy without a union.''

Van Heiningen appears and says Sun really wants a good relationship with its employees and has demonstrated it can resolve problems without a third party and she believes that will continue. Kolenda then appears and states that if District 1199 is selected and does not listen or live up to its promises, it may take the employees up to 4 or 5 years just to start the processes to get rid of them.

The narrator then tells the viewer that the employees are going to vote in a secret-ballot election, that the voter should vote their conscience, for what ''is best for you personally.'' She points out that the voter may have signed a petition or attended a union meeting, but that they can still vote ''no'' in the secret-ballot election.

The legality of a nearly identical video was discussed in the recent decision of Judge Thomas Wilks in the case of *Mediplex of Milford*, JD–86–95, Cases 34–CA–6677, 34–CA–6747, and 34–RC–1258, issued May 9, 1995 [Board affirmed at 319 NLRB 281 (1995)], and made a part of the record herein as the General Counsel's Exhibit 7.[17] In an thorough analysis, Judge Wilks concluded that there was no merit to the complaint allegations regarding the video. I concur completely and adopt his reasoning set forth at pages 13–16 of that decision. As was the situation in Judge Wilks' case, neither the General Counsel nor the Union attacked the veracity of any statement made in the video. There is no statement in the video pointed to by the General Counsel that he contends is violative of the Act. Rather, the General Counsel contends that the video must be viewed in the context of ''the entire tenor of the Respondent's antiunion campaign, dramatized by the massive amounts of literature disparaging the Union and informing employees of how poorly the Union fares in achieving any kind of gains for employees.'' The literature referred to is in the record as General Counsel's Exhibit 5. The General Counsel does not assert that any of this mass of literature is unlawful, so I cannot see how combining lawful literature with an otherwise lawful videotape makes one or the other or both unlawful.

On brief, the General Counsel contends that the video unlawfully disparages the Union by linking it to the deaths of nonstrikers and patients at nursing homes. The entire reference to strikes and negative results of strikes is described above at page 21, infra. A similar argument was made in *Mediplex of Milford*, supra, and was found wanting by Judge Wilks. As set forth in that decision at page 12,

> [i]n *Sears, Roebuck and Co*., 305 NLRB 193 (1991), the Board stated:
>
> > words of disparagement alone concerning a union or its officials are insufficient for finding a violation of Section 8(a)(1) [of the Act.]
>
> That case involved ''flip and intemperate remarks'' of a manager with respect to the likelihood of a union resorting to leg breaking to collect dues, to be his personal opinion which it held to be protected under the free speech provisions of Section 8(c) of the Act.
>
> In *Optica Lee Borinquen, Inc*., 307 NLRB 705 (1992), the Board adopted the decision of the Administrative Law Judge which found as not violative an employer's agent's comments to the effect that a union as designated bargaining agent, would replace reason with force and which, having nothing to lose, would cause strikes and strike violence. The Judge, at page 709, pointed out in his decision adopted by the Board the following:
>
> Under Board policy, the mere mention that strikes are possible,[8] or the characterization of union leaders as having nothing to lose, or prone to violence, and the use of force to achieve their objectives[9] will not alone remove campaign propaganda from the protective guarantees of Section 8(c). In the final analysis, the references to strikes and force in this letter was an attempt to draw upon emotionalism and overstatement, but merely produced an overall message easily recognizable as self-serving hyperbole.
>
> Argumentation of this type is left routinely to the good sense of employees. See, e.g., *Auto Workers (Kawasaki Motors) v. NLRB*, 834 F.2d 816, 822 (9th Cir. 1987). Accordingly, it is concluded that the letter did not suggest that strikes and violence were inevitable consequences of unionization under conditions violative of Section 8(a)(1) of the Act.

[17] The videos in question used different spokespersons to say virtually the same things. The instant video has been slightly toned down in some regards when compared with the video considered by Judge Wilks. For example, in the video in his case, following the recitation about the 67-year-old woman who suffered a heart attack after watching her car being vandalized, the woman's adult daughter is quoted as saying, ''Those bastards they killed my mother.'' This statement is not included in the video I watched, nor is the assertion that Federal strike laws were changed after the 1973 strike at the New York League of Hospitals and Nursing Homes.

[8] *McCarty Processors*, 292 NLRB 359 (1990); *Agri-International*, 271 NLRB 925, 926 (1984).

[9] *Clark Equipment Co.*, 278 NLRB 498, 499–500 (1986); *Central Broadcast Co.*, 280 NLRB 501, 502 (1986); *Associacion Hospital Del Maestro*, 272 NLRB 853, 857 (1984).

The General Counsel relies on the case of *Sheraton Hotel Waterbury*, 312 NLRB 304 fn. 3 (1993). The two-person majority found that the employer ''disparaged and undermined the Union in the eyes of the employees'' and thus violated Section 8(a)(1) of the Act. The employer in that case seized on an incident between a union agent who, on being rebuffed for solicited support in the home of an employee, allegedly obliquely implied injury to the employee's home and family, i.e., ''it would be a shame if something happened'' to the employee's house. The employer, on being informed of the incident, circulated a letter to employees accusing the union of widespread threats and acts of intimidation. He also arranged for the 24-hour patrolling of the place of employment, i.e., a hotel, by police officers. The judge found as fact no documented threat to the hotel and he held further that the employer used the incident to make a ''dramatic, inflammatory and largely unfounded attack on the Union's credibility.'' Id. at 338.

In the instant case, unlike *Sheraton Hotel Waterbury*, supra, there is no factual misrepresentation and the video does not even purport to threaten that the involved Union might harm employees. The Respondent here did hire security guards for traffic management purposes after an undisputed incident in which an employee was nearly run over by a union agent. This incident is not mentioned, however, in the video nor was it mentioned in the speeches that accompanied the showing of the video, nor was any letter or other memo circulated among employees discussing the incident. As noted in *Mediplex of Milford*, supra at 289:

> The problem with the General Counsel's analysis is that unlike the *Sheraton Hotel Waterbury* case, the Respondent herein is not alleged nor proven to have inflamed the fears of potential voters by engaging in conduct and by making false pronouncements which are sought to create an image of an immediate, real and direct threat to their physical safety at their place of employment during the election campaign. Unlike that case, the Respondent herein was not alleged nor proven to have engaged in an unfounded or even exaggerated attack upon the union's credibility. Instead, the Respondent engaged in what it purports to be an accurate exposure of the Union's involvement in post-certification and post-contract bargaining impasse strikes where violence had occurred and poses to the voter the question whether the voter wants a bargaining agent with such a record. There is no challenge herein to the accuracy of those claims. In effect, the General Counsel is arguing that an employer may not make nasty references to a labor organization's involvement with violence affected strike activity regardless of the truth of those claims because it will upset the tranquility of the voter who might not want a representative with such an unfortunate history. However, it is the very essence of election campaigning to convince the voter not to support the other party. Involved in that process is by necessity an objective to undermine support for the other side, which in turn frequently involves disparagement of its position or its abilities. As noted in the *Sears* case, the Board no longer involves itself in the monitoring of the truth or falsity of pre-election campaign propaganda.
>
> There is nothing in the videotape which suggest that the voters were in any imminent danger to their person or property during the election campaign or could be necessarily thereafter, should a strike occur. Rather they were advised that strikes can occur upon bargaining impasse and that as a fact of life, strikers can become extremely unpleasant, nasty and even violent. I conclude that the General Counsel's theory of violation would preclude Respondent from making any reference to the Union's involvement in past violence-afflicted strikes as a consideration by the voter for its choice of bargaining agent regardless of accuracy. As such, I find that it unduly limits Respondent's free speech rights recognized under Section 8(c) of the Act. Accordingly, I find no unlawful disparagement in the videotape.

In the instant case the General Counsel, as was also the case in the *Mediplex of Milford* case, argues that the videotape informed employees that it would be futile for them to select the Union as their collective-bargaining representative by stating that negotiations often last for years and often do not result in a written contract; and threatened that employees would lose benefits if they selected the Union as their bargaining representative by indicating that previously instituted changes and future planned policy changes would be lost during bargaining. He expands on this argument by stating that ''considering the video as a whole, it is clear that Respondent's message was that voting for the Union is a waste of time, because it will take so long to get a contract, even if one is reached, and even then the wages will be lower than the wages the employees would have received without having to be bothered by the Union. Considering the statements by the narrator that bargaining must begin ''from scratch'' it can be found that the Respondent was, quite simply, informing employees that voting was a futile gesture, and such statements violate Section 8(a)(1) of the Act.

The only language that I can find in the involved video that can be relied on by the General Counsel to support his argument is as follows:

The narrator explains that a collective-bargaining agreement is not automatic, even in situations where the employer owns other unionized facilities where contracts have been in place. She states, ''in most cases the Union must bargain from scratch,'' which she points out often takes a period of 6 months to a year to achieve. She states that in the meantime, ''new wage and benefit policies'' cannot be put into effect and that in some cases a union never negotiates a first contract.

The narrator then comments that District 1199 often promises to obtain for newly organized employees the benefits they have obtained in collective-bargaining agreements for other bargaining units at other employers' facilities. The narrator then points out that District 1199 has taken 5 to 7 years to negotiate wages that matched those obtained in its other older contracts at other locations. The video names three locations in support of this statement. She asks the viewer to compare the Union's experience at St. Elizabeth's (another health care facility employer) where it took years to obtain the benefits it had obtained in its other older contracts at

other locations. She states that the Union was certified as bargaining agent at St. Elizabeth's in 1992, but that by 1997, the collective-bargaining agreement there will still not achieve the average wage level currently provided by Respondent at the nonunion Windham Hill facility. She points out again that the Windham Hill employees do not pay union dues and that over the life of the St. Elizabeth contract the employees will pay over a thousand dollars in union dues.

The General Counsel made the same argument in *Mediplex of Milford* and the judge therein held, supra at 14:

> In *Bi-Lo*, 303 NLRB 749, 750 (1991), the Board stated that in evaluating ''bargaining from scratch' comments that a distinction must be made between (1) a lawful statement that benefits could be lost through the bargaining process and (2) an unlawful threat that benefits will be taken away and the Union will have to bargain to get them back. The Board cited, inter alia, the case relied upon herein by Respondent, *Histacount Corp*., 278 NLRB 681, 689 (1986). The Board noted in *Bi-Lo* that the Employer, in effect, expressed opinions in its message which it found to be lawful, i.e., contract negotiation was akin to horse trading in which new benefits can be gained or existing benefits lost but that in first contract negotiations, there is a greater uncertainty because of the lack of bargaining experience between the parties upon which to base a prediction. The Board reversed the administrative law judge who found the employer's comments susceptible to the interpretation that the employer intended to strip away present benefits before bargaining started.
>
> In *Lear-Siegler Management Service Corp*., 306 NLRB 393 (1992), the Board stated as follows:
>
> > The standard for determining whether statements of this type violate Section 8(a)(1) of the Act is set out in *Taylor-Dunn Mfg. Co*., 252 NLRB 799, 800 (1980), as follows:
> >
> > It is well established that ''bargaining from ground zero'' or ''bargaining from scratch'' statements by employer representatives violate Section 8(a)(1) of the Act if, in context, they reasonably could be understood by employees as a threat of loss of existing benefits and leave employees with the impression that what they may ultimately receive depends upon what the union can induce the employer to restore. On the other hand, such statements are not violative of the Act when other communications make it clear that any reduction in wages or benefits will occur only as a result of the normal give and take of negotiations.

I can find no threat to take away any existing benefits either expressly made or implied in the video. It does point out correctly that the Respondent cannot unilaterally implement new wage and benefit proposals during negotiations. I cannot find that the video informs employees that voting for the Union is a futile gesture. The video merely points out with concrete examples the track record of the Union at certain other nursing homes and compares that record with its Windham Hill facility. Absent a promise that without a Union the Respondent would implement the Windham Hill wage rates at Mediplex of Wethersfield, or a threat that Respondent will in some fashion bargain in bad faith, I find that such statements are a lawful expression of the Respondent's free speech rights. The General Counsel perhaps forgets that the Union is not speechless itself, and can counter such arguments and comparisons with examples and facts of its own.

Contrary to the complaint allegations, the video does not unlawfully disparage the Union, inform the employees that it would be futile to select the Union as their bargaining representative, or threaten employees with loss of benefits or jobs. Again, for the reasons set forth above and in *Mediplex of Milford*, supra, I do not find that the video violates the Act.

### K. *Did Respondent Violate the Act by the Statements of Current Administrator Kevin Prisco Made to Employees in February 1995?*

Quinn left the facility in November and was replaced by Kevin Prisco, who had had a similar position at Mediplex of Milford, another Sunrise facility. Marcus Edwards testified that Prisco held a group meeting with employees in January 1995,[18] telling them that ''The Judge hasn't decided anything about the Union yet, but if the Union do get in it would take years and years for them to negotiate a contract with the employees.''

Prisco holds monthly meetings with employees and held three such meeting in the middle of February 1995 in order to speak with employees on all shifts. At these meetings he spoke to the employees about the status of the union matters. According to Prisco, he told the employees that the matter was in the hands of the NLRB in Washington and that there had been no decision. At that time, no complaint had issued on the charges filed. He denied mentioning the subject of negotiations or a contract in these meetings. He denied saying that it would take years to get a contract at Mediplex even if the Union came in.

As part of General Counsel's Exhibit 5 is a letter dated February 15, 1995, to employees from John Kolenda, a vice president of Respondent's parent company, relating to the Union's organizing efforts at its Connecticut facilities. With respect to the Wethersfield facility, the letter states:

> At Mediplex of Wethersfield, a Labor Board election was scheduled to take place in early October. A week before the election was scheduled, however, the Union, sensing that it would lose, asked the Labor Board to postpone the vote and filed unfair labor practices against the Company. We believe that the Union was very concerned that it would lose the election and therefore was looking for an excuse not to have a vote. We also believe we did not commit any unfair labor practices. The Labor Board is currently deciding whether they should hold a hearing on the Union's allegations. Again, this situation could take months if not years until we get a final decision.

This letter notes that monthly meetings will be held with employees to keep them up to date.

I credit Prisco's assertions that he did not say that negotiations would take years and years. I did not find Edwards to-

[18] I believe Edwards to be in error about the date of the meeting, which appears to have been in mid-February, 1995.

tally credible and the General Counsel correctly points out Prisco's credibility problems in the *Mediplex of Milford* case. As the letter set out above reflects, however, the Respondent did make a reference to the NLRB process taking years and years. I find it likely that this was what Prisco referred to and it was misunderstood by Edwards.

### L. *Did Powers Violate the Act by Issuing Edwards a Written Warning on January 31, 1995?*

On January 28, 1995, Edwards, about an hour after his shift started, asked Supervisor Lois Tower if he could leave the facility to take care of a private patient he was being paid to care for. He told Tower he would be leaving about an hour and half later and would be gone for about 2 hours.[19] According to Edwards, Tower gave him permission, but told him to tell the CNAs and Charge Nurses on his shift that he was leaving so they could cover for him. He contends that he did this. When he left the facility, he did not punch out saying he could not find his timecard. He went to the patient's residence and stayed about 1 hour and 45 minutes. He then attempted to go back to Respondent's facility, but had car trouble and was about 25 or 30 minutes late returning. He did not call the facility to report that he would be late returning. He did not punch in on his return, claiming his card was still missing. He did not report his missing timecard to anyone on leaving or on returning. On his return to his workstation, he was told by a charge nurse to report to the nursing office. He did so and was confronted by Human Resource Supervisor Mary Jane Harrower, who asked why he did not call in to say he would be late returning. He told her about the car trouble. He contends that his timecard was in the nursing office and he explained that he did not punch out and back in because his card was missing. He had been allowed to visit private patients while on duty in the past, but had always clocked out and back in, as the time was not paid time by Respondent. This conversation with Harrower is not mentioned in Edwards' affidavit, given a month after the January 28, 1995 incident.

Edwards worked his next scheduled workday without incident, but the next day was summoned to the nursing office. There, Arlene Powers and Harrower were awaiting him. Powers told him he did not call the facility and inform his supervisors that he would be late returning. Edwards explained why he was late. Powers did not accept the excuse and gave Edwards a written warning. The warning states:

> On Sat. 1–28–95 Marcus was given permission by the Supv. to leave the building for 1 1/2 hr.—he stated he had a private duty pt. in the community—the pt. had just been discharged from the hospital and needed to be seen by him—he was given permission provided he inform [sic] the nurse and staff of situation. Marcus did not report to the charge nurse but rather stated to another CNA that ''he would be back in a while.'' He did not report back to the facility until 8:10 pm. Also during this time he did not call and report that he would be longer than the 1 1/2 hours—He also did not punch out or back in on his time card.

After signing the warning, Edwards complained to the two supervisors that if he were being disciplined over the incident, Supervisor Tower should also be disciplined.[20] He also complained that he should be paid more money because he worked extremely hard. According to Edwards on direct examination, Harrower asked him why he did not quit and work at another facility. He told her he loved the place and while he was there he was trying to make things better. Harrower replied that he did not like the policies at Wethersfield so why didn't he leave. On cross-examination, he testified that Harrower told him to drop a dollar in pay and get the benefits if he wanted them. He also testified on cross-examination that he pointed out that he got more pay and benefits at the other Sunrise facility where he worked part time. He agreed that it was at this point that Harrower suggested that if he made more money and received more benefits at the other facility, why didn't he leave Wethersfield and work full time at the other facility. He admitted telling her that if the other facility would guarantee him more hours he would leave.

He contends that the subject of the Union came up and he told them that with a union, it would be better for him financially as he would get more money, paid vacations, and a pension. He added that he had no choice but to try to bring the Union back into the facility. He contends that Powers told him not to try to bring the Union back. Edwards then accused them of trying to get rid of him because of the Union and reiterated that with a union he would have more benefits. He testified that Powers then said that he should speak with Prisco. He replied that they both knew that Prisco would give him the runaround about the budget.

The General Counsel contends that the evidence offered by Edwards supports a finding of unlawful motivation under a *Wright Line*[21] analysis, and as Respondent offered no independent evidence through its witnesses about the matter, a violation should be found. I cannot agree. Although as noted with my discussion of Edwards' earlier warnings, the General Counsel demonstrated Respondent's animus and knowledge of Edward's prior union activities, I cannot find that Edwards was engaging in protected activity when he was warned nor that anything about the warning seems suspicious. Edwards was not disciplined for leaving the facility, he was disciplined for coming back late without giving notice that he would be late and for not clocking out and clocking in. I found Edwards explanation of the circumstances surrounding his being late and failure to call in to be inherently unbelievable. The matter of his timecard being in the nurses' office on the night he came back in is not in an affidavit given at a time close to the events in question, though it would have been very material and relevant. Even if one believes Edwards on this point, it does not explain his failure to report the purportedly missing timecard to any one until he was confronted by Harrower. It similarly does not explain why he could not have called in the fact that he would have been late returning to the facility. I have to agree with Respondent in its assertions on brief that

[19] Respondent was under the impression that he would be gone for only an hour and a half.

[20] On brief, Respondent asserts that Tower was in fact disciplined for giving Edwards permission to leave the facility to care for his private patient. However, I can find no evidence in the record to support this assertion.

[21] See *Wright Line*, 251 NLRB 1083 (1980).

Edwards appears to be making up his story about car trouble and the reasons he could not call in. I did not believe the testimony when I first heard it and I do not believe it now.

I also do not find that a prima facie case has been made that union activity had any part in the discipline. As I find that Edwards in fact did not clock in and out and did not call in when he knew he would be late, a warning was clearly in order. There is nothing in his testimony that would indicate that his prior union activity motivated the warning. He does not contend that Powers mentioned that activity when giving the warning. There was no showing that Edwards was engaged in any ongoing union activity at the time. His unsolicited comments about the Union after the warning was given do not demonstrate that Powers gave him the warning for engaging in protected activity. There is likewise no showing of any attempt by management to find a reason to either discipline or get rid of the number of other employees who were active in the union campaign. For the reasons set forth above, I do not find that Respondent violated the Act by giving Edwards a written warning on January 31, 1995.

### M. *Is the Issuance of a Bargaining Order Called for in this Case?*

The Board's test for the issuance of a bargaining order is that set out in *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969). In *Gissel*, the Court delineated two types of situations when bargaining orders are appropriate: (1) ''exceptional'' cases marked by ''outrageous'' and ''pervasive'' unfair labor practices; and (2) ''less extraordinary'' cases marked by ''less pervasive'' practices. Thus, the Court placed its approval on the Board's use of a bargaining order in ''less extraordinary'' cases when the employer's unlawful conduct has a ''tendency to undermine [the union's] majority strength and impede the election processes.'' The court indicated that when unfair labor practices are of this character and the union at one time had a majority support among the unit employees, the Board may enter a bargaining order. With respect to such a remedy, the Court said:

> In fashioning a remedy in the exercise of its discretion, then, the Board can properly take into consideration the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employees sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue . . . .

Clearly, if the facts of this case come within the description of either type case in which a bargaining order is justified, then it would be the second type when the employer's unfair labor practices are less extraordinary, but would have the tendency to undermine the Union's majority status and impede the election process.

#### 1. Did the Union at some point have majority support?

I find that by August 19, the Union had obtained authorization cards from 159 of the 261 employees in the bargaining unit.[22] Union Organizer Cathy Panasuk authenticated the cards she solicited at union meetings on July 20, as well as 12 others she personally procured. It is well established that the authenticity of union authorization cards may be proved by the testimony of card solicitors who received the cards. *Windsor Industries*, 265 NLRB 1009, 1021 (1982). Moreover, the cards of employees who did not personally deliver such cards to Panasuk are authenticated when an organizer or a business agent testifies ''that a card allegedly signed by one employee was given to the agent by another employee and the [ALJ] had also examined W–4 forms.'' *L.C.C. Resort, Inc*., 170 NLRB 1140 (1986), cited in *Windsor Industries*, supra, 265 NLRB at 1021.

The purpose of the cards is clear from the face of the card, and the cards are valid. Under *Cumberland Shoe Corp*., 144 NLRB 1268 (1963), a signed union authorization card is valid if the card states on its face that the signer authorizes the union to represent an employee for collective-bargaining purposes and not to seek an election, unless it is proved that the employee was told that the sole purpose of signing the card was for an election. It is well established that where the written purpose of a union authorization card is stated unambiguously, the Board may not, absent evidence of misrepresentation, inquire into the subjective motives or understanding of the card signer to determine what the signer intended to do with the card. *DTR Industries*, 311 NLRB 833, 840 (1993). Although Respondent in its questioning raised this issue, there is no evidence that any of the card signers were told that the cards would be used solely for an election. There is no evidence of misrepresentation or coercion.

Other than the 71 cards authenticated by Panasuk, employee witnesses authenticated a total of 28 cards (Edwards—19; Rodriguez—6; and 1 each for James, Russell, and Simpson). The General Counsel has added these figures and asserts that 6 individuals authenticated some 99 cards. He has inadvertently overlooked the fact, however, that nine of these cards were authenticated by more than one person. These cards are General Counsel's Exhibits 34, 62, 70, 79, 80, 94, 118, 156, and 166. The General Counsel requested that I compare the signatures of the remaining 76 cards with the corresponding W–4 handwriting examples, citing as authority for me to do so the cases of *L.C.C. Resort, Inc*., supra; *Anchorage Times Publishing Co*., 237 NLRB 544, 561 (1978); and *Heck's Inc*., 166 NLRB 186 (1967). I have made the requested comparison and authenticate all but seven cards. I do not verify General Counsel's Exhibits 3, 12, 14, and 101 because I do not believe the signatures are the same. I do not verify General Counsel's Exhibits 28, 30, 110, and 126 because there is no W–4 card submitted, and a comparison is not possible.

#### 2. Given that the Union had majority support on August 19, does the Respondent's actions warrant the issuance of a bargaining order?

The Respondent here did engage in unfair labor practices. Specifically, I have found that it discriminatorily warned Marcus Edwards for a violation of a company rule and like-

[22] As discussed hereinafter, the Union had in its possession seven additional cards. However, these were cards that I was asked to authenticate by comparison of the signatures thereon with corresponding signatures on the employee's W–4 form. I could not do so.

wise restricted his access to the facility because he was engaging in activities on behalf of the Union. It threatened Edwards with the loss of benefits and at least impliedly threatened him that layoffs would result from unionization. It threatened Domingo Rodriguez with loss of benefits or alternatively promised benefits if the Union were selected in the first case or was not selected in the second case. It threatened its employees generally in meetings with a loss of personal favors if the Union were elected. A security guard hired by Respondent unlawfully harassed certain employees on one occasion before the scheduled election. On the other hand, Respondent significantly made no threats about layoffs generally, made no threats that it would close the facility, and did not threaten anyone with discharge or discharge anyone for engaging in union activities. Employees wore union buttons to work without incident and there were no proven incidents of harassment save for Edwards and perhaps the employees who were harassed by the security guard on the night of October 3.

The Union's position with respect to the campaign and the effects of Respondent's actions was given in the testimony of Cathy Panasuk. Panasuk was one of the Union's employed organizers in the campaign. She testified that the campaign began when some workers at Respondent's facility called the Union and asked to talk about a union. Some of the employees had worked at other, unionized facilities and were familiar with the Union. The involved facility had just been purchased by Sunrise and there were going to be changes in benefits and working conditions. After the campaign started, a loose employee organizing committee was established. Some of its members were Marcus Edwards, Domingo Rodriguez, Verda James, Sandy Simpson, Donna Russell, and Richard Green. The Union invited Respondent's employees to the union hall to attend meetings, the first large such meeting taking place on July 20. There were four meetings held that day, to accommodated employees working different shifts. At these meetings, union officials told the employees that the meeting was the start of a struggle, for workers to get together and better their working conditions and, thereby, their family and their lives. They were told the struggle would not be an easy thing and that everybody had to stick together. The employees were asked to sign authorization cards, with the officials saying the cards were to join the Union.

On August 19, Panasuk passed out union buttons to employees at the facility and then she and about 50 employees engaged in what she calls a ''walk on the boss.'' The assembled employees went to the front door of the facility and met Quinn. Quinn addressed Panasuk, saying, ''You must be Cathy.'' She identified herself as an organizer for the Union and Quinn announced, ''I'm Tom Quinn, the Administrator, and you know you're breaking the law by being on this property.'' Panasuk responded, ''We're here just to ask for voluntary recognition. We're willing to prove that over half the workers want the Union here.'' Quinn said, ''I don't recognize you, and I don't recognize your damned Union, and get off my property.'' Panasuk retorted, ''Speaking of breaking the law, it would be good if you didn't intimidate workers and break the law that way too.'' And then she and the employees left. As they left, a Wethersfield police officer arrived and after a brief conversation he left. At the time of the walk on the boss, the Union had authorization cards from about 65 percent of the unit employees. She did not have any such cards with her at the time of demand for recognition.

The Union held regular meetings with the employees, usually on Wednesdays at the union hall. Support for the campaign ended according to Panasuk on October 7, when no one came to a scheduled meeting. The members of the organizing committee would not return her calls. The Union had been leafletting employees with some success, but as the election approached, they began rejecting the literature. Because of decreased support, the Union canceled the election. According to Panasuk, employees were not sticking together, they were feeling demoralized. She testified she was told by employees, ''It's just too much, all these meetings at work. I want this to be over.''

She amplified on this point saying, ''I didn't get returned phone calls. I left messages, and they didn't call me back. When we were leafletting, people would not stop and take the literature. People who ordinarily stopped to talk for a minute—few minutes on the way out of work did not. They would cross the street rather than talk to me.'' When asked whether based on the foregoing she had concluded that the Union had lost the support of the employees, she answered, ''That was part of it. That wasn't all of it.'' With respect to the other part, she testified, ''The other part of it was that we had filed so many unfair labor practice charges. And people were feeling like they could not actively talk to anyone there about a union or be pro-union there, because of the repercussions. That those people were so afraid, that they were unable to exercise their rights.'' ''They were frightened of the boss, not of the Union.''

Although I heard the testimony of a number of employee witnesses, none of them expressed these sentiments and in fact none of them appeared the least bit afraid of the Employer. As noted by Panasuk, many of the employees wore union buttons at work. Without any support from employee witnesses and in the total absence of any discharges or warnings other than the one given Edwards, I do not credit Panasuk's testimony in this regard.

Panasuk related some specific reasons given her by employees for their withdrawal of support of the Union. One person told her that she was convinced that the Union's insurance plan would not be as good for them as what Sunrise was presently offering and said that the union plan would cost more money, they would have fewer benefits, and they would have to pay union dues. Another employee told her that employees were tired of everybody arguing, and the administration having all of the meetings. And other people told her they were ''just too frightened by all of this.''

The employees who gave her this information were generally members of the organizing committee passing on thoughts of other employees. Two of the primary members of the organizing committee withdrew their support for the Union, a fact that Edwards contended cost the Union much support. No reason was given for this change of heart on the part of the two committee members.

I cannot find that a bargaining order is an appropriate remedy here. It is well settled that elections, not bargaining orders, are the preferred remedy for employer misconduct during a union organizing campaign. I believe that an election is preferable to a bargaining order under the facts of this case. I can find no so called ''hallmark'' violations, that is, violations so serious that they clearly would ''undermine [the

union's] majority strength and impede the election process.'' I have found no threats of discharge were made during the preelection campaign period. I have not found that Respondent violated the Act by making the selection of the Union appear to be a futile act, nor have I found that it predicted that a strike was inevitable as would be permanent replacement of strikers. The Respondent has not threatened closing the facility or reducing existing benefits. The unfair labor practices that I have found were committed are in the main isolated incidents, generally involving one employee, Marcus Edwards, who remains a supporter of the Union. The fact that the Employer's antiunion campaign succeeded does not make the campaign unlawful. Based on the evidence adduced here, the Respondent effectively portrayed its health insurance plan as being superior to that offered by the Union. It did give apparently truthful examples of the superiority of its wages at its nonunion facilities compared with other facilities where the Union was in place. It did give apparently truthful information about strikes the Union had engaged in. I will not speculate on what aspect of the Respondent's campaign struck a favorable chord with its employees, but I cannot find that it was its unfair labor practices that turned the employees against the Union.[23]

## CONCLUSIONS OF LAW

1. Sunrise Health Care Corporation d/b/a Mediplex of Wethersfield is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and is a health care institution within the meaning of Section 2(14) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. An appropriate bargaining unit of Respondent's employees within the meaning of Section 9(a) of the Act is as follows:

> All full-time and regular part-time service and maintenance employees, including certified nursing assistants, physical therapy aides, occupational therapy aides, housekeeping employees, dietary employees, laundry employees, central supply clerk, unit secretaries, admissions secretaries, and maintenance employees employed by the Employer at Mediplex of Wethersfield, located at 341 Jordan Lane, Wethersfield, Connecticut, but excluding cooks, social service designees, therapeutic recreation directors, staffing coordinators, admission coordinators, business office clerical employees, licensed practical nurses, and guards, professional employees, and supervisors as defined in the Act.

4. The Respondent engaged in conduct in violation of Section 8(a)(1) of the Act by:

(a) Threatening to discharge Marcus Edwards on July 6 because he engaged in protected concerted activities.

(b) Restricting Marcus Edwards' access to the facility at times when he was not on duty because he engaged in activities on behalf of the Union.

(c) Coercively interrogating Marcus Edwards and threatening him that layoffs would result from the employees selection of the Union as their bargaining representative.

(d) By threatening Domingo Rodriguez that the employees would lose benefits if the Union were selected as bargaining representative or, alternatively, promising greater benefits if the Union were not selected.

(e) By its security guard's harassment of employees on October 3 because they engaged in protected concerted or union activities.

(f) By threatening to stop granting personal favors to employees if the Union were selected as their bargaining representative.

5. The Respondent engaged in conduct in violation of Section 8(a)(1) and (3) of the Act by giving Marcus Edwards a written warning on August 1, because he engaged in activities on behalf of the Union.

6. The foregoing unfair labor practices committed by Respondent are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

7. I do not find that Respondent committed the other unfair labor practices alleged in the complaint.

## THE REMEDY

Having found that Respondent has engaged in conduct in violation of Section 8(a)(1) of the Act, it is ordered to cease and desist therefrom, and to take the following affirmative action deemed necessary to effectuate the policies of the Act.

I recommend that Respondent be ordered to rescind the warnings given to Marcus Edwards on July 27, and August 1, 1994, to remove any record of such warnings from his personnel records, and to notify him in writing that this has been done and that such warnings will not be used against him for any reason in the future.

Based on these findings of fact and conclusions of law and on the entire record, I issue the following recommended[24]

## ORDER

The Respondent, Sunrise Health Care Corporation d/b/a Mediplex of Wethersfield, Wethersfield, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening to discharge employees because they engage in protected concerted activities.

(b) Restricting employees access to the facility at times when they are not on duty because they engage in activities on behalf of the Union.

[23] Respondent offered evidence to establish two other defenses against the issuance of a bargaining order. First it sought to show that there had been significant turnover in the bargaining unit. It fails in this defense as comparing the list of card signers to the R. Exh. 1 reflects that over half of the current employees were card signers and are still working at the facility. It also argued that the chances of further unfair labor practices shown to have been committed have greatly diminished as both Quinn and Kolenda have left the employ of Sunrise. I cannot acccept this argument. Powers is still there, Turner is still CEO of the parent corporation, van Heiningen is still with the Company, and Quinn has been replaced by Prisco, who, according to *Mediplex of Milford*, supra, oversaw a much more unlawful campaign than that waged by Quinn.

[24] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Coercively interrogating employees and threatening them that layoffs would result from the employees' selection of the Union as their bargaining representative.

(d) Threatening employees that they would lose benefits if the Union were selected as bargaining representative or, alternatively, promising greater benefits if the Union were not selected.

(e) Using security guards to harass employees because they engage in protected concerted or union activities.

(f) Threatening to stop granting personal favors to employees if the Union were selected as their bargaining representative.

(g) Giving employees written warnings because they engage in activities on behalf of the Union.

(h) In any like or related manner interfering with, restraining, or coercing you in the exercise of the rights guaranteed you by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Respondent shall remove any record of warnings given Marcus Edwards on July 27 and August 1, 1994, from his personnel records, and notify him in writing that this has been done and that such warnings will not be used against him for any reason in the future.

(b) Respondent shall post at its Wethersfield, Connecticut facility copies of the attached notice marked ''Appendix.''[25] Copies of the notice, on forms supplied by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by it immediately upon receipt and be maintained by it for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[25] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''